Nos. 90-913 and 90-914

In the Supreme Court of the United States

OCTOBER TERM, 1990

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, PETITIONER

v.

MCORP FINANCIAL, INC., ET AL.

MCORP, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
JEFFREY A. CLAIR
Attorneys

JAMES V. MATTINGLY, JR.
General Counsel

RICHARD M. ASHTON
Associate General Counsel

Board of Governors of the Federal Reserve System
Washington, D.C. 20551

Department of Justice
Washington, D.C. 20530

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 1818(i)(1) barred the district court presiding over MCorp's bankruptcy case from enjoining the Federal Reserve Board's pending administrative proceedings against MCorp under the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818 *et seq.*

2. Whether despite the express limitation of 12 U.S.C. 1818(i)(1), the district court may invoke *Leedom* v. *Kyne*, 358 U.S. 184 (1958), to exercise jurisdiction over MCorp's claim that the Federal Reserve Board lacked statutory authority to file administrative charges enforcing its "source of strength" regulations.

3. Whether the Federal Reserve Board has statutory authority to promulgate and enforce its "source of strength" regulations, which make bank holding companies responsible for maintaining adequate capitalization of subsidiary banks.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, MCorp and MCorp Management were plaintiffs in the district court and appellees in the court of appeals. The Official Creditors' Committee of MCorp, MCorp Financial, Inc., and MCorp Management was an intervenor in the district court and an appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-913

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, PETITIONER

v.

MCORP FINANCIAL, INC., ET AL.

No. 90-914

MCORP, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the court of appeals (J.A. 13-36) is reported at 900 F.2d 852. The opinion of the district court (J.A. 37-55) is reported at 101 Bankr. 483.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1990. A petition for rehearing was denied on August 6, 1990. 90-913 Pet. App. 27a-28a. On October 22 and 26, 1990, Justice Scalia extended the time within which to file petitions for a writ of certiorari to and including December 10, 1990. The petitions were filed on that date, and were granted on March 4, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(a), 1842(c), 1844) are reprinted at App., *infra*, 1a-8a. Pertinent sections of the Financial Institutions Supervisory Act of 1966 (12 U.S.C. 1818), as amended by Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 450-453, are reprinted at App., *infra*, 9a-26a. Sections 908 and 910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3907, 3909) are reprinted at App., *infra*, 26a-29a. Section 23A of the Federal Reserve Act, 12 U.S.C. 371c, is reprinted at App., *infra*, 29a-38a. Pertinent sections of Federal Reserve Board regulations, 12 C.F.R. Part 225, are reprinted at App., *infra*, 38a-41a. Pertinent sections of the Bankruptcy Code (11 U.S.C. 105, 362; 28 U.S.C. 1334(b), 1334(d)) are reprinted at App., *infra*, 41a-50a.

STATEMENT

A. Federal Reserve Board Regulation of Bank Holding Companies

1. Congress has vested the Board of Governors of the Federal Reserve Board with substantial supervisory authority over the formation, structure, and operation of bank holding companies, *i.e.*, any company that has direct or indirect control of any bank. 12 U.S.C. 1841(a)(1). The Board exercises such authority under three related statutory schemes—the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. 1841 *et seq.*, the International Lending Supervision Act of 1983 (ILSA), 12 U.S.C. 3901 *et seq.*, and the Financial Institutions Supervisory Act (FISA), 12 U.S.C. 1818, as amended by Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, Tit. IX, 103 Stat. 450-453.

a. Under the BHCA, a company may not acquire a bank without first obtaining the Board's approval. 12 U.S.C. 1842(a). In reviewing a company's application to acquire a bank, the Board must consider, among other factors, "the financial and managerial resources and future prospects of the company or companies and the banks concerned." 12 U.S.C. 1842(c); see *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978). The BHCA generally requires the company to limit its operations to banking activities and to other "nonbanking" activities that are closely related or a proper incident to banking. 12 U.S.C. 1843; see also 12 C.F.R. 225.21-225.31.[1] Under its supervisory powers, the Board "from time to time may require reports [from] * * * and * * * may make examinations of each bank holding company and each subsidiary thereof." 12 U.S.C. 1844(c). The Board has authority to curtail a bank holding company's "nonbank" activities that pose risks to a bank's financial stability or are "inconsistent with sound banking principles or with the purposes of [the BHCA]." 12 U.S.C. 1844(e).

b. Under Sections 908 and 910 of ILSA, 12 U.S.C. 3907 and 3909, the Board regulates and enforces the capital adequacy of each holding company. These provisions

[1] The BHCA empowers the Board to "issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of [the Act] and prevent evasions thereof." 12 U.S.C. 1844(b).

empower the Board to establish minimum capital levels, 12 U.S.C. 3907(a), and provide that the failure of a holding company to maintain these capital levels "may be deemed by the [Board], in its discretion, to constitute an unsafe and unsound practice within the meaning of [12 U.S.C. 1818]." 12 U.S.C. 3907(b)(1); see 12 U.S.C. 3909(a)(2). Moreover, ILSA provides that the Board may order holding companies to achieve required levels of capital where necessary to remedy unsafe or unsound banking practices. 12 U.S.C. 3907(b)(2); see 12 C.F.R. 263.35-263.40.

c. Under FISA, the Board has authority to begin "cease-and-desist" proceedings against a bank holding company if, in the Board's view, the company "is engaging or has engaged" or the Board "has reasonable cause to believe that [the company] is about to engage, in an unsafe or unsound practice in conducting the business of such [company]." 12 U.S.C. 1818(b)(1); see 12 U.S.C. 1818(b)(3) (Board's authority under Section 1818(b) applies to "any bank holding company, and to any subsidiary (other than a bank) of a bank holding company"). After an administrative hearing,[2] the Board may direct the holding company to "take affirmative action to correct the conditions resulting from any such violation or practice." 12 U.S.C. 1818(b)(1). As amended by Section 902 of FIRREA, FISA further provides that the Board's remedial powers include the authority to order the offending holding company, in certain circumstances,

[2] FISA and the Board's implementing regulations establish comprehensive procedures for exercising these enforcement powers. The statute requires sufficient notice to the holding company of the underlying charge, an evidentiary hearing before an independent presiding official, and a decision based on the hearing record. 12 U.S.C. 1818(b)(1), (b)(3), 1818(h). Board regulations further provide that the holding company may appear through counsel, compel the attendance of witnesses and the production of documents, adduce any relevant and material evidence, cross-examine adverse witnesses, and present its position through written submissions and oral arguments. 12 C.F.R. 263.1 *et seq.*

to make restitution to subsidiaries, to dispose of a loan or asset, or to "take such other action as [the Board] determines to be appropriate." 103 Stat. 450-451 (to be codified at 12 U.S.C. 1818(b)(6)).

In addition, the Board has authority under FISA to issue a temporary cease-and-desist order—without first holding a hearing—if it finds that the unsafe or unsound practice "is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors" before completion of administrative proceedings under Section 1818(b)(1). 12 U.S.C. 1818(c)(1). The Board's order under this provision may direct "affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings." 12 U.S.C. 1818(c)(1). Such an order is effective immediately upon service and is enforceable by injunction in the appropriate United States District Court. 12 U.S.C. 1818(c)(1) and (d).

FISA provides specific avenues for judicial review of matters involving the Board's enforcement actions. First, a bank holding company may petition for review of a *final* cease-and-desist order under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the appropriate United States Court of Appeals. 12 U.S.C. 1818(h)(2). Second, the United States District Courts have jurisdiction to issue an injunction "setting aside, limiting, or suspending" a *temporary* cease-and-desist order pending completion of the administrative enforcement proceedings. 12 U.S.C. 1818(c)(2). Third, upon the Board's application, the district courts have jurisdiction to enforce compliance with any notice or order issued under Section 1818. 12 U.S.C. 1818(i)(1). FISA, however, expressly bars federal courts from assuming jurisdiction to review or intervene in the Board's enforcement proceedings in any other manner or circumstances, stating that

> except as otherwise provided in [12 U.S.C. 1818] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. 1818(i)(1); see 12 U.S.C. 1818(h)(1).

2. As part of its supervision of bank holding companies' corporate practices, the Board promulgated its "source of strength" regulation, which provides that "[a] bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not con[d]uct its operations in an unsafe or unsound manner." 12 C.F.R. 225.4(a)(1) (Regulation Y). The Board first articulated its "source of strength" concept as a policy in the case-by-case review of companies' applications to acquire banks. In reviewing these applications, the Board made clear that it would not approve bank acquisitions unless the prospective parent holding company would retain the ability to act as a source of financial and managerial assistance to its subsidiary banks, should the need for such assistance arise.[3] And in *First Lincolnwood Corp.*, 439 U.S. at 248, this Court upheld the Board's authority to disapprove the formation of a bank holding company on the basis of the grounds asserted in those administrative determinations, namely, the applicant's inability to act as a "source of strength" to subsidiary banks.

In 1984, the Board codified the source of strength policy in its published regulations governing a holding company's corporate practices. See 49 Fed. Reg. 818, 820 (1984). As part of that codification, the Board explained that its source of strength regulation

---

[3] See, *e.g.*, *Citizens Bancorporation*, 61 Fed. Res. Bull. 806, 806 (1975); *Midwest Bancorporation, Inc.*, 56 Fed. Res. Bull. 948, 950 (1970); *Mid-Continent Bancorporation*, 52 Fed. Res. Bull. 198, 200 (1966).

> is derived from section 3(c) of the BHC Act [12 U.S.C. 1842(c)], which requires the Board to consider the financial and managerial resources and future prospects of the company and banks concerned; from section 5(b) of the BHC Act [12 U.S.C. 1844(b)], which authorizes the Board to issue regulations; and from the Board's authority under the Financial Institutions Supervisory Act to issue cease and desist orders to prevent unsafe or unsound banking practices (12 U.S.C. 1818(b)(1) and (3)).

48 Fed. Reg. 23,520, 23,523 (1983) (notice of proposed rulemaking).

In 1987, the Board issued a formal statement clarifying its long-standing policy that bank holding companies should act as sources of strength to their subsidiary banks by "standing ready to use available resources to provide adequate capital funds to subsidiary banks during periods of financial stress or adversity." *Policy Statement; Responsibility of Bank Holding Companies to Act as Sources of Strength to Their Subsidiary Banks*, 52 Fed. Reg. 15,707, 15,707 (1987). In support of that policy, the Board pointed out that a holding company derives financial benefits from ownership of institutions that can accept federally insured deposits, and reasoned that these commercial advantages create a correlative obligation to serve as sources of strength and support to subsidiary banks. *Ibid.* The Board also stated that bolstering a subsidiary bank's capital base promotes bank safety and public confidence, and reduces the federal deposit insurance fund's exposure to loss. *Ibid.* Accordingly, the Board stated that "[a] bank holding company's failure to assist a troubled or failing subsidiary bank * * * would generally be viewed as an unsafe and unsound banking practice or a violation of Regulation Y or both" that would result in an appropriate enforcement action. *Id.* at 15,707-15,708.

3. The Board also supervises bank holding companies' corporate practices under Section 23A of the Federal Reserve Act, 12 U.S.C. 371c. Section 23A, among other things, requires extensions of credit by a subsidiary bank to a nonbank affiliate to be secured by collateral. In particular, the statute prohibits a bank from extending credit to a nonbank affiliate unless, at the time of the transaction, the extension of credit is secured by collateral having a market value of at least 100% of the loan. Congress sought to "prevent misuse of commercial bank resources stemming from non-arm's length financial transactions with affiliated companies." S. Rep. No. 536, 97th Cong., 2d Sess. 31 (1982). Accordingly, Congress authorized the Board, in carrying out the statutory mandate, to

> issue such further regulations and orders, including definitions consistent with this section, as may be necessary to administer and carry out the purposes of this section and to prevent evasions thereof.

12 U.S.C. 371c(e).

B. Bankruptcy Court Jurisdiction and Equitable Authority

1. Congress has vested the United States District Courts with original and exclusive jurisdiction over all cases filed under the Bankruptcy Code. 28 U.S.C. 1334(a). The district court in which a bankruptcy case is filed also has exclusive jurisdiction over all the debtor's property as of the commencement of the case and the property of the debtor's bankruptcy estate. 28 U.S.C. 1334(d). Moreover, Congress has given the district courts concurrent jurisdiction over civil proceedings related to or arising out of a debtor's bankruptcy case:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. 1334(b).

2. Congress also gave the district courts certain equitable powers in connection with the exercise of bankruptcy jurisdiction. As relevant here, the Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays

> the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this [bankruptcy] title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. 362(a)(1). The scope of this automatic stay, however, is limited. A bankruptcy petition does *not* operate as a stay

> under [11 U.S.C. 362(a)(1)], of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. 362(b)(4). Moreover, the Bankruptcy Code generally provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. 105.

C. The Proceedings in This Case

1. In October 1988, the Board issued a "notice of charges" under 12 U.S.C. 1818(b) against MCorp, a bank holding company headquartered in Texas. (MCorp and two of its subsidiaries involved in this case, MCorp Financial, Inc., and MCorp Management, will be referred to collectively as MCorp). MCorp then owned 25 subsidiary banks, many of which were in deteriorating financial condition and could not meet the Comptroller of the Currency's requirements for minimally acceptable capital reserves. The Board alleged that MCorp

> was engaging in unsafe and unsound practices, likely to cause substantial dissipation of the assets of

> MCorp that could be used to allow MCorp to serve as a source of financial strength for the subsidiary Banks.

J.A. 14; see *id.* at 39.[4] Accordingly, the Board scheduled an administrative hearing to determine whether the company should be ordered to cease and desist from specified unsafe and unsound practices and to undertake appropriate remedial measures. In an amended notice of charges filed a week later, the Board sought to require MCorp to

> implement[] an acceptable capital plan that would ensure that all of MCorp's available assets are used to recapitalize the Subsidiary Banks that are suffering capital deficiencies.

Id. at 14.

At the same time, the Board issued temporary cease-and-desist orders under 12 U.S.C. 1818(c)(1) that prohibited MCorp from dissipating its assets through dividend payments or unusual business transactions, and directed MCorp to identify those subsidiary banks that would receive capital infusions from MCorp's corporate assets and resources. See J.A. 65-67, 68-70, 84-86.

The Board postponed resolution of the "source of strength" charges pending MCorp's attempt to secure

---

[4] In particular, the Board alleged that it had reasonable cause to believe that

> MCorp will not take the actions that are necessary (1) to prevent the substantial dissipation of corporate assets through cash dividends, and (2) to maintain and prevent the dissipation of available resources at the parent company level that could be used, where appropriate, to make immediate capital injections into the Subsidiary Banks.

J.A. 63.

In the amended notice of charges filed one week later, the Board also alleged that it had reasonable cause to believe that "MCorp will not take the actions that are necessary * * * to use all available resources to make immediate capital injections into the Subsidiary Banks." J.A. 80-81.

"open bank" financial assistance from the Federal Deposit Insurance Corporation. See 12 U.S.C. 1823(c). In late March 1989, however, the FDIC denied MCorp's request, concluding that such financial assistance would not be in the public interest.

2. Soon after the FDIC's decision, three of MCorp's creditors filed an involuntary petition against MCorp in the United States Bankruptcy Court for the Southern District of New York. On March 28 and 29, 1989, the Comptroller of the Currency declared a total of 20 of MCorp's 25 subsidiary banks insolvent and, by operation of law, placed them under the receivership of the FDIC.[5] On March 31, MCorp filed voluntary bankruptcy petitions in the United States Bankruptcy Court for the Southern District of Texas. J.A. 14, 39.[6]

At this time, the Board issued a second notice of charges against MCorp. This notice alleged that MCorp had violated Section 23A of the Federal Reserve Act, 12 U.S.C. 371c. In particular, the notice claimed that MCorp had caused two of its closed banks to lend $63.7 million to MCorp Management without requiring sufficient collateral. J.A. 87-93; see *id.* at 14-15. And in late May 1989, the Board issued a second amended notice of charges (relating to the original October 1988 notice), alleging that MCorp had failed to act as a "source of strength" to its five remaining subsidiary banks. *Id.* at 186-195.[7]

---

[5] MCorp later filed a separate federal court action against the Comptroller of the Currency and the FDIC, alleging that the closing of 12 of its subsidiary banks violated the National Bank Act. On February 1, 1991, the district court entered an order granting MCorp's motion for partial summary judgment. *MCorp* v. *Clarke*, No. CA3-89-0831-F (N.D. Tex. Feb. 1, 1991). That case remains pending before the district court.

[6] The voluntary and involuntary bankruptcy proceedings were later consolidated in the Southern District of Texas. J.A. 14.

[7] Given the divestiture of MCorp's interest in the banks declared insolvent by the Comptroller, MCorp had no further obligation to act as a source of strength to those banks.

3. Before the Board held an administrative hearing on the outstanding charges, MCorp filed an adversary bankruptcy proceeding against the Board in the Southern District of Texas. MCorp sought a temporary restraining order and a preliminary injunction to prevent the Board from prosecuting its administrative charges and taking further actions against MCorp without prior approval of the bankruptcy court. J.A. 102-124, 125-140. On May 3, 1989, the bankruptcy court denied MCorp's request for temporary relief. *Id.* at 15.

The Board then filed in the district court for the Southern District of Texas a motion to withdraw the reference of the adversary proceeding in the bankruptcy court. See 28 U.S.C. 157(d). The district court granted that motion on May 12, thereby agreeing to exercise jurisdiction over MCorp's request for injunctive relief. J.A. 15.

On June 9, the district court granted MCorp's motion and issued a preliminary injunction against the Board's administrative enforcement proceedings. J.A. 37-55. The court concluded that the express jurisdictional limitation contained in FISA, 12 U.S.C. 1818(i)(1)—providing that "[n]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement" of any Board order, except as set forth in the statute—has "been overridden through control of the debtor's estate having been entrusted to the authority of the bankruptcy court." J.A. 44-45; see 28 U.S.C. 1334(d).[8]

[8] Alternatively, the court determined that "the Board's generalized, diffuse interest in the holding company as well as the duplicative, distracting hearings militate for its being not exempt from the [automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362]." J.A. 48. Moreover, the court held that it had general equitable power under 11 U.S.C. 105 to enjoin the Board's proceedings that would threaten MCorp's assets or otherwise impede MCorp's reorganization. J.A. 48-49.

D. The Court of Appeals Decision

In May 1990, the Fifth Circuit vacated the injunction barring further proceedings on the Board's Section 23A charges, but remanded with instructions to enjoin proceedings on the Board's source of strength charges. J.A. 13-36.

With respect to its jurisdiction, the court of appeals concluded that

> the plain language of § 1818(i) deprives the district court of jurisdiction to enjoin the Board's administrative proceedings if the Board's actions do not exceed the authority Congress granted to it.

J.A. 22. In so concluding, the court rejected MCorp's contention that the bankruptcy jurisdiction conferred by 28 U.S.C. 1334 supersedes or otherwise qualifies FISA's express limitation (12 U.S.C. 1818(i)) on a court's equitable jurisdiction. As the court explained, 28 U.S.C. 1334(b) (as well as its legislative history) "reflects no intent that the bankruptcy court's jurisdiction supersede the exclusive jurisdiction of an administrative agency, or reinvest the courts with jurisdiction barred by § 1818." J.A. 18. Section 1334(d) was inapplicable, the court determined, because "the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward in its administrative proceedings. J.A. 20.

Nevertheless, citing *Leedom* v. *Kyne*, 358 U.S. 184 (1958) and circuit precedent, the court of appeals determined that

> [i]f the Board's proceedings exceed its statutory authority, we may review the Board's action * * * despite the jurisdictional bar of § 1818; if the Board "was not acting within [the] authority granted by Congress, then 12 U.S.C. § 1818(i) could not withdraw jurisdiction."

J.A. 22-23 (quoting *Manges* v. *Camp*, 474 F.2d 97, 99 (5th Cir. 1973)). The court therefore concluded that

the district court's authority to enjoin the Board's administrative proceedings at issue depended on whether those proceedings fell within the Board's statutory mandate.

Turning first to the Board's Section 23A proceedings, the court of appeals determined that the Board had authority to regulate MCorp's relationship with former subsidiary banks and therefore held that the Board was "well within its authority in seeking an order against MCorp to cease and desist any transactions which violate the provisions of § 23A, or 'to take affirmative action' as may be appropriate." J.A. 24 (quoting 12 U.S.C. 1818(b)(1)).

Turning next to the Board's "source of strength" proceedings, the court of appeals held that those "proceedings exceed[ed] [the Board's] statutory authority." J.A. 13.[9] The court concluded that the BHCA "does not grant the Board authority to consider the financial and managerial soundness of the subsidiary banks after it approves the application." *Id.* at 31. Accordingly, the court held that "the Board is without authority under the BHCA to require [MCorp] to transfer its funds to its troubled subsidiary bank." *Ibid.*[10]

The court of appeals also rejected the Board's contention that "MCorp's failure to provide capital to its subsidiary banks [is] an unsafe or unsound practice which

[9] As a threshold matter, the court rejected the argument that MCorp may not challenge the Board's authority because it has not exhausted its administrative remedies. In the court's view, "[t]he sole question presented is a legal one * * * [and that] legal issue * * * can be resolved without further factual development." J.A. 25-26.

[10] The court suggested that the Board was not necessarily without an adequate alternative to its "source of strength" regulations. In its view, "[a]s a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial [s]oundness." J.A. 31-32 n.5 (noting similar practice of the Office of Thrift Supervision).

the Board may act to restrain under [FISA, 12 U.S.C. 1818]." J.A. 32. Applying the framework established by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court determined that "Congress has not spoken clearly to what constitutes an unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies." J.A. 33. The court therefore examined the "reasonableness" and permissibility" of the Board's construction of that phrase, *i.e.*, that a "failure of the holding company to inject capital into subsidiary banks is an 'unsafe or unsound' practice." *Ibid.*

In the court's view, "[e]nforcement of the Board's source of strength regulation * * * can hardly be considered a 'generally accepted standard[] of prudent operation.'" J.A. 34 (quoting 112 Cong. Rec. 26,474 (1966), cited in *Gulf Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982)). Not only would such a transfer of funds require a holding company such as MCorp "to disregard its own corporation's separate status," it would also "amount to a wasting of the holding company's assets in violation of its duty to its shareholders." J.A. 34. Moreover, the court stated that the Board's regulations conflict with "one of the fundamental purposes of the BHCA," namely, "to separate banking from commercial enterprises," since those regulations would permit the Board to treat a holding company as "merely an extension of its subsidiary bank." *Ibid.*[11] Accordingly, the court concluded that

> the Board's determination that the holding company's failure to transfer its assets to a troubled subsidiary was an "unsafe or unsound practice" under §§ 1818

[11] In this regard, the court noted that Congress, in enacting and amending the BHCA in 1956 and 1966, "set forth detailed limits on transactions considered unsound between subsidiary banks and holding companies, without mentioning the infusion of capital by holding companies into subsidiaries." J.A. 35.

(b)(1) and (3) is an unreasonable and impermissible interpretation of that term.

J.A. 35.[12]

SUMMARY OF ARGUMENT

I. FISA's express limitations on federal court equitable jurisdiction protect a narrow class of administrative actions from premature judicial interference. Until the Board's proceedings culminate in a final cease-and-desist order, FISA bars the federal courts from exercising equitable jurisdiction over pending administrative actions. The statute could not be clearer: "[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. 1818(i)(1).

In this case, MCorp jumped the gun in seeking to stop the Board's enforcement proceedings in their tracks upon the filing of notices of charges. Accommodating MCorp's litigation strategy, the district court's injunction flies in the face of the plain language of FISA's preclusion pro-

[12] On August 6, 1990, the court of appeals denied the Board's petition for rehearing and suggestion of rehearing en banc. 90-913 Pet. App. 27a-28a. On August 23, the court of appeals denied MCorp's motion for a stay of the mandate.

On remand from the court of appeals, the district court in November 1990 entered an order enjoining the Board from, among other activities, prosecuting its outstanding source of strength administrative charges against MCorp. Injunction on Remand ¶ 4, *MCorp* v. *Board of Governors*, No. H-89-1677 (S.D. Tex. Nov. 8, 1990). In January 1991, the district court issued a modified injunction retaining that prohibition. J.S. 222; see *id.* at 219, 220-224.

MCorp, through the pending bankruptcy proceedings, has been pursuing plans to sell each of its remaining five subsidiary banks. To date, MCorp has sold two of those banks. See 90-913 Br. in Opp. 3. MCorp has also executed contracts to sell two of its three remaining banks. Those contracts have not yet received the requisite approvals from either the bankruptcy court or the appropriate federal banking regulators.

vision, 12 U.S.C. 1818(i). Accordingly, the court of appeals should have vacated the district court's order barring the Board from prosecuting its enforcement action.

Nothing in the Bankruptcy Code calls for a different outcome. In vesting federal courts with jurisdiction and equitable authority over bankruptcy matters, see 11 U.S.C. 105, 362; 28 U.S.C. 1334, Congress has not superseded FISA's preclusion provision. None of those bankruptcy provisions—by their terms—purport to repeal or qualify FISA's express and more particular limitations on federal court equitable jurisdiction. The Bankruptcy Code's "automatic stay" provision, 11 U.S.C. 362, does not carve out an exception to Section 1818(i). Similarly, the Code's general grant of equitable authority, 11 U.S.C. 105(a), does not supersede the precise jurisdictional limitations of FISA. And Congress's general grant of jurisdiction over bankruptcy matters in 28 U.S.C. 1334 does not take precedence over FISA's withdrawal of jurisdiction in 12 U.S.C. 1818(i).

II. Despite its otherwise correct and straightforward reading of Section 1818(i), the court of appeals proceeded to review the substantive validity of the Board's source of strength regulations under the doctrine set forth in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). That review, under the circumstances presented here, amounts to a misappropriation of jurisdiction under *Leedom* v. *Kyne* in violation of Congress's intent.

Jurisdiction under *Leedom* v. *Kyne* is inappropriate where, as here, Congress has provided alternative means of judicial review of agency action. See 12 U.S.C. 1818(h)(2), 1818(i)(1). Indeed, jurisdiction under *Leedom* is reserved for the extreme circumstance of reviewing agency action that is manifestly beyond the agency's delegated authority and thus in excess of the agency's jurisdiction. The decision below improperly brushed aside this fundamental limitation; the error in so doing is all the more manifest by the court of appeals' concession that the Board's authority to promulgate and

enforce its source of strength regulations turned on application of the second prong of the *Chevron* framework. That only applies when the answer is *not* plain from the statute. In addition, *Leedom* does not apply in the circumstances presented, *i.e.*, the absence of legally binding agency action. Here, the Board has only filed notices of charges and initiated administrative proceedings. At bottom, the court of appeals—in the face of the express preclusion provision of FISA—had no occasion even to review the Board's source of strength regulations under the guise of *Leedom*-based jurisdiction.

III. Even assuming the court of appeals had jurisdiction to consider the validity of the Board's source of strength regulations, the court erred in striking them down. In doing so, the court of appeals misconstrued the Federal Reserve Board's statutory authority, derived from three statutes (the Financial Institutions Supervisory Act, the International Lending Supervision Act, and the Bank Holding Company Act, see pp. 2-6, *supra*) to supervise bank holding companies' activities regarding subsidiary banks—particularly where those activities may adversely affect bank safety. The decision below is inconsistent with Congress's delegation of supervisory power to the Board and impermissibly restricts the Board's delegated authority to exercise continuing control and supervision of bank holding company practices that impair the stability of the Nation's banking system.

ARGUMENT

I. FEDERAL COURTS SITTING IN BANKRUPTCY LACK AUTHORITY TO ENJOIN PENDING FEDERAL RESERVE BOARD ENFORCEMENT ACTIONS AGAINST BANK HOLDING COMPANIES UNDER THE FINANCIAL INSTITUTIONS SUPERVISORY ACT

A. The Financial Institutions Supervisory Act Provides The Exclusive Means For Judicial Review Of Federal Reserve Board Enforcement Actions Against Bank Holding Companies

Under FISA, 12 U.S.C. 1818, as amended by Section 902 of FIRREA, Pub. L. No. 101-73, Tit. IX, 103 Stat. 450-453, the Federal Reserve Board exercises broad and exclusive authority to regulate bank holding companies. Congress sought through this legislation to fill the regulatory gap concerning actions of a parent holding company or one of its "nonbank" subsidiaries that threatened the safety, soundness, or stability of a subsidiary bank. See S. Rep. No. 902, 93d Cong., 2d Sess. 10 (1974).[13] As a result, Congress amended FISA in 1974 to grant the Board exclusive power—after administrative proceedings—to compel a holding company to cease and desist from unsafe and unsound banking practices. See Act of Oct. 28, 1974, Pub. L. No. 93-495, Tit. I, § 110, 88 Stat. 1506 (codified at 12 U.S.C. 1818(b)(3)); see also pp. 37-42, *infra*.

FISA's express provisions for judicial review of matters involving the Board's enforcement actions confirm Congress's firm commitment to the Board's expertise in regulating bank holding company practices. First, a bank holding company may petition for review of a *final* cease-

[13] As originally enacted in 1966, FISA's authority to remedy unsafe banking practices applied principally to federally insured banks and did not extend to bank holding companies. See Act of Oct. 16, 1966, Pub. L. No. 89-695, § 201, 80 Stat. 1046.

and-desist order under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the appropriate United States Court of Appeals. 12 U.S.C. 1818(h)(2).[14] Second, the United States District Courts have jurisdiction to issue an injunction "setting aside, limiting, or suspending" a *temporary* cease-and-desist order pending completion of the administrative enforcement proceedings. 12 U.S.C. 1818(c)(2). Third, *upon the Board's application*, the district courts have jurisdiction to enforce compliance with any notice or order issued under Section 1818. 12 U.S.C. 1818(i)(1). FISA, however, expressly bars federal courts from assuming jurisdiction to review or intervene in the Board's enforcement proceedings in any other manner or circumstances. Its language of preclusion is admirably clear:

> [E]xcept as otherwise provided in [12 U.S.C. 1818] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. 1818(i)(1); see 12 U.S.C. 1818(h)(1).

Under this straightforward statutory scheme, Congress has shielded the Board's ongoing enforcement actions from premature judicial interference. Until the Board's proceedings culminate in a final cease-and-desist order, FISA's plain language bars the federal courts from exercising equitable jurisdiction over pending administrative actions. For that reason, the lower courts have unanimously agreed that Section 1818(i) divests courts of

[14] Once a petition for review is filed, FISA provides that the court of appeals' jurisdiction shall be "exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. 1818(h)(2). The sole exception to this exclusive jurisdiction is limited to instances where the Board, with the court's permission, modifies, terminates, or sets aside its order. See 12 U.S.C. 1818(h)(1) and (2).

equitable jurisdiction to enjoin pending enforcement proceedings initiated under FISA's authority to order a financial institution to "cease and desist" from unsafe or unsound banking practices or violations of law. See *Eastern Nat'l Bank* v. *Conover*, 786 F.2d 192, 193 (3d Cir. 1986); *Investment Co. Inst.* v. *FDIC*, 728 F.2d 518, 524-525 (D.C. Cir. 1984); *First Nat'l Bank* v. *United States*, 530 F. Supp. 162, 166-168 (D.D.C. 1982); see also *Groos Nat'l Bank* v. *Comptroller of Currency*, 573 F.2d 899, 895 (5th Cir. 1978) (FISA precludes exercise of equitable jurisdiction absent the agency's clear departure from statutory authority).

Here, MCorp jumped the gun in seeking to stop the Board's enforcement proceedings when the Board filed notices of charges. And the district court's injunction against those proceedings is flatly inconsistent with the plain language of 12 U.S.C. 1818(i). Accordingly, the court of appeals should have vacated the district court's order barring further prosecution of the Board's enforcement action in its entirety. See *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 928 (1991) ("[O]ur inquiry is complete if we find the text • • • to be clear and unambiguous."); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 110 S. Ct. 456, 460 (1989) ("Our task is to apply the text, not to improve upon it."); *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 309 (1989) (courts "are not at liberty to create an exception where Congress has declined to do so").

B. The Bankruptcy Code Does Not Supersede FISA's Preclusion Of Judicial Review Or Otherwise Authorize Equitable Jurisdiction Over Pending Federal Reserve Board Enforcement Actions

In vesting federal courts with jurisdiction and equitable authority over bankruptcy matters, see 11 U.S.C. 105, 362; 28 U.S.C. 1334, Congress has not superseded FISA's preclusion provision, 12 U.S.C. 1818(i). As an

initial matter, none of those bankruptcy provisions—by their terms—purport to repeal or qualify FISA's express limitations on federal court equitable jurisdiction. As this Court has long recognized, "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (internal quotation marks and citations omitted). That canon of statutory construction applies with particular force where, as here, Congress has expressly limited federal court jurisdiction over a particular subject matter: " 'When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by mere implication flowing from subsequent legislation.' " *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 808 (1976) (quoting *Rosencrans* v. *United States*, 165 U.S. 257, 262 (1897)).

In this case, Congress enacted a specific jurisdictional limitation in FISA protecting a narrow class of administrative actions from premature judicial interference. In the absence of congressional intent reflected in either the text or legislative record of the various bankruptcy provisions MCorp invokes, see 90-914 Pet. 10-25, the court of appeals correctly declined MCorp's invitation to ascribe to Congress an intention to except bankruptcy proceedings from the straightforward application of FISA's withdrawal of jurisdiction.[15]

---

[15] Where Congress intended the bankruptcy courts to exercise equitable jurisdiction previously withheld by statute, it said so. For example, in enacting 11 U.S.C. 105, which grants the bankruptcy court the power to issue orders necessary to carry out the purposes of the Bankruptcy Code, Congress noted its intent to carve out an exception to the anti-injunction provisions of 28 U.S.C. 2283, and to authorize injunctions staying actions in state court. H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977); see also 28 U.S.C. 1334(b) (conferring concurrent bankruptcy jurisdiction over civil proceedings otherwise committed to the exclusive jurisdiction of another court). MCorp can point to no similar

1. The Bankruptcy Code's "automatic stay" provision, 11 U.S.C. 362, does not carve out an exception to Section 1818(i). Section 362 generally provides that the filing of a petition in bankruptcy "operates as a stay, applicable to all entities, of—(1) the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor * * * or to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case." 11 U.S.C. 362(a)(1). Although Section 362 confers certain equitable powers once the court sitting in bankruptcy acquires jurisdiction, the provision does not purport to define or confer jurisdiction. By its terms, FISA makes clear that no court has authority "to affect by injunction or otherwise" the Board's pending administrative proceedings. 12 U.S.C. 1818(i)(1). For that reason alone, Section 362 cannot otherwise trump the withholding of injunctive power in FISA.

In any event, Section 362 could not support an injunction or stay of the Board's administrative proceedings in this case. The Bankruptcy Code provides that the stay imposed by 11 U.S.C. 362(a) does not extend to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4). The Board's proceedings commenced under FISA fall comfortably within this so-called "police or regulatory power" exception. Courts have long recognized that the government's "police power" "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." *Chicago, B. & Q. Ry.* v. *Illinois ex rel. Drainage Commissioners*, 200 U.S. 561, 592 (1906). And given the

---

expressions of Congress's intent to repeal FISA's anti-injunction provisions, let alone evidence of the "clear intention" that is required. *Crawford Fitting*, 482 U.S. at 445.

plain meaning of the term "regulatory,"[16] the courts of appeals have consistently held that the "police or regulatory power" exception to the stay extends to the broad range of regulatory activities, including economic regulation of business practices similar to the banking regulations at issue in this case.[17]

2. The Bankruptcy Code's general grant of equitable authority, 11 U.S.C. 105(a), likewise does not supersede the jurisdictional limitations of FISA. Section 105(a) provides that a court exercising bankruptcy jurisdiction

---

[16] See, *e.g.*, *Webster's Third New International Dictionary* 1913 (1986) (defining "regulate" as "to govern or direct according to rule"); *FPC* v. *Corporation Comm'n*, 362 F. Supp. 522, 532 (W.D. Okla. 1973) ("The primary meaning of the word 'regulate' is to lay down the rule by which a thing shall be done."); see 5 U.S.C. 551(4) (defining "rule," for purposes of the Administrative Procedure Act, as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * * and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof").

[17] See, *e.g.*, *Eddleman* v. *Department of Labor*, 923 F.2d 782, 790-791 (10th Cir. 1991) (Department of Labor action to enforce minimum wage standards of Service Contract Act exempt from automatic stay); *In re Commonwealth Cos.*, 913 F.2d 518, 521-526 (8th Cir. 1990) (government's action under the False Claims Act exempt from automatic stay); *Brock* v. *Rusco Indus., Inc.*, 842 F.2d 270, 273 (11th Cir.) (action under Fair Labor Standards Act to recover unpaid minimum wages exempt from automatic stay), cert. denied, 488 U.S. 889 (1988); *In re Berry Estates, Inc.*, 812 F.2d 67, 71 (2d Cir.) (rent control proceedings exempt from automatic stay), cert. denied, 484 U.S. 819 (1987); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986) (NLRB unfair labor practice proceedings exempt from automatic stay); *Cournoyer* v. *Town of Lincoln*, 790 F.2d 971, 974-977 (1st Cir. 1986) (action to enforce zoning restrictions exempt from automatic stay); *CFTC* v. *Co Petro Marketing Group, Inc.*, 700 F.2d 1279, 1283-1284 (9th Cir. 1983) (CFTC action to enjoin violations of Commodity Exchange Act exempt from automatic stay); *SEC* v. *First Financial Group*, 645 F.2d 429, 437 (5th Cir. 1981) (SEC proceeding to enjoin fraudulent sales of securities exempt from automatic stay).

"may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code." That provision, however, is not a roving commission to do equity or a license to advance the interests of the debtor without regard to other substantive limitations on the debtor's conduct or the bankruptcy courts' powers. As this Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988). Indeed, the Court recently pointed out that "a bankruptcy court order [issued under Section 105] might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion." *United States* v. *Energy Resources Co.*, 110 S. Ct. 2139, 2142 (1990). In other words, Section 105—as a grant of general equitable power—does not purport to redefine bankruptcy court jurisdiction or otherwise repeal express limitations on the court's equitable powers.

MCorp nevertheless asserts that FISA's jurisdictional limitation must give way where its application would conflict with the "policies and goals of the Bankruptcy Code, or the efficient administration of a bankruptcy case." 90-914 Pet. 15. But such ill-defined considerations do not supersede the sort of express legislative determination reflected in FISA, 12 U.S.C. 1818(i). As this Court has pointed out:

> If Congress wishes to grant the [bankruptcy] trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

Midlantic Nat'l Bank v. *New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986) (quoting *Swarts* v. *Hammer*, 194 U.S. 441, 444 (1904)); cf. *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 110 S. Ct. 2126,

2132 n.4 (1990) (construction of Bankruptcy Code must be based on language of statute, as opposed to policy "unsupported by any textual authority"). MCorp can point to nothing in the text of 11 U.S.C. 105 that empowers the bankruptcy court to ignore independent and express limitations on its equitable jurisdiction, such as that found in FISA, 12 U.S.C. 1818(i).

3. MCorp also errs in suggesting (90-914 Pet. 17-25) that Congress's general grant of jurisdiction over bankruptcy matters in 28 U.S.C. 1334 takes precedence over FISA's precise withdrawal of jurisdiction in 12 U.S.C. 1818(i). MCorp, for example, first mistakenly relies on 28 U.S.C. 1334(b), which provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

By providing that the district courts may exercise this jurisdiction "[*n*]*otwithstanding* any Act of Congress that confers exclusive jurisdiction on a *court or courts* other than the district courts" (emphasis added), Congress effectively superseded jurisdictional limitations that otherwise would have deprived the district courts of jurisdiction over matters previously committed to the exclusive jurisdiction of another *judicial* forum. See *Brock* v. *Morysville Body Works, Inc.*, 829 F.2d 383, 385-387 (3d Cir. 1987). The statute, however, does not speak to ongoing proceedings before an administrative agency. Rather, Congress referred only to civil proceedings that would lie within another court's jurisdiction. For that reason, the court of appeals correctly concluded that Congress limited the reach of Section 1334(b) to the "division of jurisdiction between bankruptcy courts and *other courts*." J.A. 18.

MCorp similarly errs (90-914 Pet. 21) in asserting that 28 U.S.C. 1334(d) vests the bankruptcy courts with

exclusive jurisdiction over FISA proceedings.[18] Section 1334(d) gives the court *in rem* jurisdiction to resolve issues affecting title to or control of the debtor's property, see, *e.g.*, *In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir. 1985), as opposed to exclusive jurisdiction over any matter that happens to touch upon the debtor's estate. As this Court has pointed out in construing a substantially similar predecessor to Section 1334(d):

> [A] court of bankruptcy has exclusive and nondelegable control over the administration of an estate in its possession. * * * There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.

Callaway v. *Benton*, 336 U.S. 132, 142 (1949) (citations omitted).[19]

Here, as the court of appeals recognized, "the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward in

---

[18] Section 1334(d) provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

[19] The bankruptcy courts' exclusive jurisdiction over the debtor's property can be traced back as far as the Bankruptcy Act of 1898. As one commentator has explained:

> The jurisdiction of the bankruptcy court under the [1898] Act was *in rem*, and turned (absent consent of an adverse party) upon custody or possession of the court. If the property of the bankrupt were in the possession of the court * * * the bankruptcy court had the jurisdiction to determine rights and interests of contending parties in and to that property. Without possession, jurisdiction was absent.

1 *Collier Bankruptcy Manual* ¶ 3.01, at 3-11 (3d ed. 1990); see, *e.g.*, *Cline* v. *Kaplan*, 323 U.S. 97, 98-99 (1944); *Thompson* v. *Magnolia Co.*, 309 U.S. 478, 481-482 (1940); *Murphy* v. *John Hofman Co.*, 211 U.S. 562, 568-570 (1909).

its administrative proceedings." J.A. 20. The Board's administrative proceedings seek to ascertain whether MCorp has violated the law or committed unsafe or unsound banking practices. Those proceedings, like all regulatory measures, may ultimately proscribe or compel certain conduct and in that indirect sense may "affect" MCorp's property. But such tangential effects—aside from being entirely speculative at this juncture—would not otherwise bring the Board's administrative actions within the bankruptcy court's exclusive jurisdiction over MCorp's property.

4. At bottom, MCorp may not avoid the unambiguous jurisdictional limitations imposed by FISA, 12 U.S.C. 1818(i), by extolling the rehabilitative functions, policies, and goals of the Bankruptcy Code. Those attributes of the Code, however laudable, cannot confer jurisdiction where none exists. Cf. *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991) (general policies of Bankruptcy Code do not override specific nondischargeability provision). As the courts have routinely recognized, if the bankruptcy court lacks authority to interfere with an administrative enforcement proceeding or other action against the debtor, the fact that the matter might adversely affect the debtor's reorganization is irrelevant.[20]

This Court has made clear that

> [t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

---

[20] See, *e.g.*, *In re Heritage Village Church & Missionary Fellowship, Inc.*, 851 F.2d 104, 105-106 (4th Cir. 1988); *United States* v. *Huckabee Auto Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986); *Briggs Transp. Co.* v. *International Bhd. of Teamsters*, 739 F.2d 341, 343-344 (8th Cir.), cert. denied, 469 U.S. 917 (1984); *In re Crowe & Assocs., Inc.*, 713 F.2d 211, 214-216 (6th Cir. 1983); *In re Petrusch*, 14 Bankr. 825, 829 (N.D.N.Y. 1981), aff'd per curiam, 667 F.2d 297 (2d Cir.), cert. denied, 456 U.S. 974 (1982).

Morton v. *Mancari*, 417 U.S. 535, 551 (1974). Congress, through FISA, 12 U.S.C. 1818(i), and the "police or regulatory power" exception to the automatic stay provision, 11 U.S.C. 362(b)(4), has balanced the debtor's need for protection from actions that could impede reorganization against the government's need to enforce the law. And Congress has struck the balance in favor of enabling the government to enforce its police and regulatory powers—a state of affairs that is consistent with FISA's provisions shielding the Board's administrative proceedings from premature judicial interference. Accordingly, the court of appeals correctly concluded that "§ 1818(i) deprives the district court of jurisdiction to enjoin the Board's administrative proceedings * * *," J.A. 22, and should have vacated the district court's order barring further prosecution of the Board's enforcement action in its entirety.

II. THE FEDERAL RESERVE BOARD'S SOURCE OF STRENGTH REGULATIONS ARE NOT SUBJECT TO JUDICIAL REVIEW UNDER THE DOCTRINE SET FORTH IN *LEEDOM* v. *KYNE*, 358 U.S. 184 (1958)

The court of appeals had no difficulty understanding what 12 U.S.C. 1818(i) said, but it went on to conclude that it did not mean what it said. Despite the court's otherwise correct and straightforward reading of the explicit preclusion provision of FISA, 12 U.S.C. 1818(i), the court of appeals proceeded to review the substantive validity of the Board's source of strength regulations under the doctrine enunciated in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). As we explain below, the court of appeals invalidated the Board's regulations based on a flawed construction of the interrelated statutory schemes Congress established to empower the Board to supervise bank holding companies' activities regarding subsidiary banks. See pp. 36-45, *infra*. As a threshold matter, however, the court of appeals erred in misappropriating jurisdiction

to reach the merits under *Leedom*. Such an exercise of jurisdiction—in the face of FISA's preclusion provision —should not stand.

A. In The Face Of Statutory Judicial Review Provisions, Jurisdiction Under *Leedom* v. *Kyne* Is Limited To Exceptional Cases Of Unauthorized Agency Action

This Court has emphasized "the painstakingly delineated procedural boundaries of [*Leedom* v.] *Kyne*." Indeed, the Court has made plain that the "*Kyne* exception [to statutory judicial review provisions] is a narrow one." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964); see *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 660 (1965). The limited reach of jurisdiction under *Leedom* v. *Kyne* is readily apparent in view of the circumstances presented in that case.

In *Leedom*, union representatives challenged a National Labor Relations Board order including both professional and nonprofessional employees within the same collective bargaining unit without the professional employees' consent. 358 U.S. at 186. This Court held that although bargaining unit certifications were not reviewable final orders under the National Labor Relations Act, the district court nonetheless had jurisdiction to consider the union's challenge. *Id.* at 191. The Court explained that lawsuit was

> not one to "review," in the sense of that term as used in the [National Labor Relations] Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

Id. at 188. The Court noted that it could not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. As a result, the Court concluded that, despite the governing statute's failure to provide for judicial review, Congress intended that the statutory rights violated by the NLRB remain judicially enforceable through the general jurisdiction of the federal courts. *Id.* at 190-191.

B. The Board's Proceedings Under FISA To Enforce The Source Of Strength Regulations Do Not Fall Within The Limited Reach Of Jurisdiction Under *Leedom* v. *Kyne*

In this case, the Board has only *initiated* administrative proceedings under FISA to determine whether MCorp has engaged in impermissible banking practices regarding its supervision of subsidiary banks. On the record presented here, the court of appeals' invocation of *Leedom* v. *Kyne* to assume jurisdiction to review the validity of the Board's substantive source of strength policy—despite FISA's explicit preclusion provision—ignores in several critical respects this Court's limitations on the *Leedom* doctrine.

1. *Leedom* neither held nor suggested that federal courts could invoke their "general jurisdiction" to review agency action, particularly where, as here, the governing statute itself provides an exclusive avenue of review that affords a full and complete means of securing judicial vindication of statutory rights. *Leedom*'s jurisdictional holding was largely predicated on the fact that the aggrieved union had no other effective means of obtaining judicial review and thus would have been left without *any* judicial remedy for a right created by Congress. 358 U.S. at 190-191; see *id.* at 197 (Brennan, J., dissenting). This Court, however, has recognized that where Congress *has* provided an avenue of judicial review, that avenue must be followed; as a result, claims of unlawful agency action must be resolved in the manner, time, and forum ordained by Congress. *E.g.*, *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379

U.S. 411, 419-423 (1965). For that reason, most other courts of appeals—contrary to the decision below—have consistently rejected invocation of jurisdiction under *Leedom* v. *Kyne* where Congress has provided alternative means of judicial review of agency action.[21]

Here, Congress has provided companies in MCorp's position an adequate means of obtaining judicial review over any question pertaining to an exercise of the Board's regulatory enforcement power or authority that has binding legal effect. Section 1818(i)(1) is not a "jurisdictional bar." J.A. 22. Rather, that statute provides only that no court shall have jurisdiction to affect any notice or order issued under FISA, "*except* as otherwise provided in [12 U.S.C. 1818]." 12 U.S.C. 1818(i)(1) (emphasis added). Section 1818, in turn, provides for plenary review of final cease-and-desist orders, stating that any party subject to an order issued after a final decision under FISA may petition for review of that order in the appropriate United States Court of Appeals. 12 U.S.C. 1818(h)(2). Once this jurisdiction is properly invoked, the court of appeals has exclusive jurisdiction to "affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. 1818(h)(2).

The court of appeals' assertion of jurisdiction under *Leedom* v. *Kyne* thus circumvents the elaborate scheme of judicial review ordained by Congress in FISA. And in so doing, the decision below improperly frustrates Congress's prerogative to set the time and choose the forum

---

[21] See, *e.g.*, *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984); *Quivira Mining Co.* v. *EPA*, 728 F.2d 477, 484 (10th Cir. 1984), cert. denied, 474 U.S. 1055 (1986); *Compensation Dep't.* v. *Marshall*, 667 F.2d 336, 343-344 (3d Cir. 1981); *Nor-Am Agricultural Prods., Inc.* v. *Hardin*, 435 F.2d 1151, 1159-1160 (7th Cir. 1970) (en banc), cert. dismissed, 402 U.S. 935 (1971); but see *Greater Detroit Resource Recovery Auth. & Combustion Eng'g* v. *EPA*, 916 F.2d 317, 323 (6th Cir. 1990).

for determining the validity of the Board's cease-and-desist actions.

2. This Court has stressed that jurisdiction under *Leedom* v. *Kyne* may not be invoked merely to "review" agency action. Rather, such an exercise of jurisdiction is appropriate only where necessary to remedy action that is manifestly beyond the agency's delegated authority and thus in excess of the agency's jurisdiction. *E.g.*, *Brotherhood of Ry. & S.S. Clerks*, 380 U.S. at 659; *Boire* v. *Greyhound Corp.*, 376 U.S. at 481; *Leedom* v. *Kyne*, 358 U.S. at 188.

The decision below brushed aside this important limitation. Here, the court of appeals acknowledged (J.A. 32-33) that the Board's authority to promulgate and enforce its source of strength regulations ultimately turned on application of step two of the framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because Congress has not spoken to the precise issue at hand. But the very existence of such an issue under the *Chevron* framework presupposes that the agency therefore has the jurisdiction and delegated authority to construe the meaning of the statutory provision. See, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *CFTC* v. *Schor*, 478 U.S. 833, 844 (1986).

In essence, the court of appeals assumed that *any* error in an agency's construction of a statute amounts to an *ultra vires* action subject to judicial review under *Leedom*. But in analogous circumstances, the Court has flatly rejected that notion:

> [I]f a discretion is vested in [an executive officer], and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion. Plainly, therefore, the respondents are wrong in asserting that

> as the facts set forth in their bill charge the [executive officer] with an error of law, he exceeded his authority.

Adams v. *Nagle*, 303 U.S. 532, 542 (1938); see also *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 692-695 (1949) (government officer's tortious action is not necessarily beyond his delegated powers). The same principle holds true for purposes of determining the scope of jurisdiction under *Leedom*, particularly where, as here, Congress has delineated other precise avenues for judicial review of agency action.

Jurisdiction under *Leedom* is reserved for those rare instances where the agency violates a clear statutory prohibition. Compare *Leedom*, 358 U.S. at 187-189 (jurisdiction exercised where challenged administrative action was admittedly contrary to a specific, mandatory prohibition in agency's governing statute). Such circumstances are not present on this record. Rather, as the court of appeals itself recognized, the challenged administrative action is based on the Board's interpretation of statutory terms left undefined by Congress. J.A. 33 ("The Congress has not spoken clearly to what constitutes an unsafe or unsound [banking] practice, leaving the development of the phrase to the regulatory agencies."). Regardless of the validity of the Board's statutory interpretation, the Board had the delegated authority—indeed the obligation—to give substantive content to the statutory term "unsafe or unsound" banking practices. Right or wrong, the exercise of that authority—although ultimately subject to judicial review under the procedures set forth in FISA—may not be reviewed outside those procedures under the narrow exception set forth in *Leedom*.

3. In any event, since jurisdiction under *Leedom* v. *Kyne* is, as this Court recognized, exercised only to prevent an agency's *ultra vires* action from destroying otherwise legally cognizable rights, 358 U.S. at 190, such jurisdiction must be predicated on agency action that

has binding legal effect on the aggrieved party. The court of appeals, however, invoked *Leedom* even in the absence of legally binding agency action. In this case, the Board has only filed notices of charges and initiated administrative proceedings; the Board has not found that MCorp violated any federal law or regulation, nor has the Board issued a final cease-and-desist order directing MCorp to take any corrective measures. These preliminary steps are not the sort of final agency actions that constitute cognizable legal injury otherwise subject to judicial review. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980); cf. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3191 (1990) (under APA, "we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect"). In the absence of such an injury, *Leedom* v. *Kyne* offers scant support for federal courts to interfere with ongoing administrative proceedings, particularly where, as here, the lawfulness of such proceedings is fully reviewable upon issuance of a final agency decision (and where the statute, by precluding other avenues of judicial review, effectively calls for the exhaustion of administrative remedies).

4. Finally, if a court is to exercise jurisdiction under *Leedom*, the legal issues must be ripe for decision. Those issues must be fit for judicial review and not turn on unresolved factual matters or speculation about what the agency might do in the future. See generally *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967); *Lujan* v. *National Wildlife Federation*, 110 S. Ct. at 3190-3191. Here, the court of appeals adverted to these concerns, but determined that the Board's authority to enforce the source of strength policy raises pure questions of law that do not require any further factual development. J.A. 25-26. The court of appeals' own analysis belies that determination.

The court of appeals concluded that an order enforcing the source of strength policy exceeds the Board's authority because it would "waste" the holding company's assets, fail to account for the company's separate corporate status, and destroy shareholder rights. J.A. 34. Nothing in the administrative record, however, supports such a conclusion; indeed, given the embryonic stage of the proceedings when the court intervened, there was no administrative record. Rather, the court assumed that any Board enforcement order, regardless of its terms, would have unduly adverse economic effects on the holding company. The economic effects of an enforcement order, however, cannot be evaluated in the absence of (1) a specific remedial order fixing the amount, timing, and terms of a source of strength asset transfer, and (2) an administrative record detailing the economic impact on the holding company. Thus, to the extent the court of appeals viewed the economic impact of a remedial order as relevant to the validity of the source of strength policy, that issue—on the court's own terms—was not ripe for judicial review under *Leedom*. Cf. *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 199-200 (1985).

III. THE FEDERAL RESERVE BOARD HAS STATUTORY AUTHORITY TO PROMULGATE AND ENFORCE ITS SOURCE OF STRENGTH REGULATIONS

In invalidating the source of strength regulations, the court of appeals misconstrued the Federal Reserve Board's statutory authority, derived from the Financial Institutions Supervisory Act, the International Lending Supervision Act, and the Bank Holding Company Act, to supervise bank holding companies' activities regarding subsidiary banks—particularly where those activities may adversely affect bank safety. The decision below is inconsistent with Congress's delegation of supervisory power to the Board and impermissibly restricts the Board's delegated authority to exercise continuing control

and supervision of bank holding company practices that impair the stability of the Nation's banking system.

A. FISA and ILSA Authorize Promulgation And Enforcement Of The Board's Source Of Strength Regulations

The court of appeals correctly recognized—as a threshold matter—that "Congress has not spoken clearly to what constitutes an unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies." J.A. 33; accord *Investment Co. Inst.* v. *FDIC*, 815 F.2d 1540, 1550 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987).[22] Consequently, the Board's conclusion that failure to act as a source of strength to subsidiary banks constitutes an unsafe or unsound practice should be upheld unless it is an unreasonable or impermissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844. The Board's source of strength policy is a reasonable and sound interpretation of its statutory duty under FISA to compel bank holding companies to cease and desist from "unsafe or unsound [banking] practices." 12 U.S.C. 1818(b)(1) and (3).

1. As originally enacted in 1966, FISA's authority to remedy unsafe banking practices did not extend to bank holding companies. In 1974, however, Congress expressly specified that this regulatory power "shall apply to any bank holding company." Pub. L. No. 93-495, Tit. I, § 110, 88 Stat. 1506 (codified at 12 U.S.C. 1818(b)(3)). In reporting out this legislation, the Senate Banking Committee explained that it

---

[22] In considering FISA, Congress relied on the memorandum submitted by the then Chairman of the Federal Home Loan Bank Board, John Horne. Chairman Horne, in commenting on the proposed legislation, noted that the term "unsafe or unsound" practice would necessarily have a flexible application adapted to the circumstances of each case. 112 Cong. Rec. 26,474 (1966). See also 112 Cong. Rec. 25,007-25,008 (1966).

> believes that the principal concern of the Federal supervisory agencies in discharging their responsibilities under the Federal law should be with the soundness of affiliated financial institutions. It is clearly in the public interest that these institutions remain sound and viable whether operated independently or as part of a holding company system. The cease and desist authority that the Committee recommends will, among other things, help prevent or terminate practices which might result in significant damage to depositors or to public confidence in the financial system.

S. Rep. No. 902, 93d Cong., 2d Sess. 10 (1974). Accordingly, the Board has acted well within its delegated authority in determining that an unsafe bank holding company practice should be defined with reference to its impact on affiliated banks.

2. The Board has also reasonably determined that bank holding company activities (or failures to take steps) that allow subsidiary banks' capital reserves to fall below minimally acceptable standards constitute unsafe or unsound banking practices within the meaning of FISA. See 12 U.S.C. 1818(b). Subsidiary banks' safety and stability depend, in large measure, on their capital position. And as this Court has pointed out, "Congress has long regarded capital adequacy as a measure of bank safety." *First Lincolnwood Corp.*, 439 U.S. at 250. For that reason, in ILSA Congress has authorized the Board —and other federal banking regulatory agencies—to establish minimum capital levels for financial institutions under their supervision. See 12 U.S.C. 3907(a). Indeed, Congress has made plain that

> [f]ailure of a banking institution to maintain capital at or above its minimum level * * * may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an unsafe and unsound practice within the meaning of [FISA, 12 U.S.C. 1818].

12 U.S.C. 3907(b).[23]

Where a parent holding company with available assets refuses to alleviate the unsafe condition of an undercapitalized subsidiary bank by making new capital investments, the holding company certainly impairs the soundness of that bank and increases the risk of damage to its depositors, which in turn undermines public confidence in the banking system. Indeed, a bank's ability to obtain capital support from its parent company—when needed—is essential to the bank's safety and soundess. The reason is apparent. It is difficult for a bank wholly or substantially owned by a holding company to raise needed capital through its own efforts. Other potential suppliers of new capital to the bank typically have little incentive to make long-term equity investments in an institution that would continue to be controlled and managed by the holding company. If a subsidiary bank's inadequate capital position is to be remedied, its parent

---

[23] In ILSA, Congress thus spoke to the concern that "[i]f certain capital ratios were essential for sound banking operations, and if the Comptroller is unable to achieve them, then the Board should be given power to require them by a general rule or standard applicable to all banks." *First Lincolnwood Corp.*, 439 U.S. at 257 (Stevens, J., dissenting).

In ILSA, Congress gave the Board explicit authority to set capital standards for holding companies and to enforce those standards by means of cease-and-desist proceedings under FISA. Since Congress directed the Board to ensure the "soundness of affiliated financial institutions," S. Rep. No. 902, *supra*, at 10, in exercising its power under FISA, the Board cannot be faulted for concluding that its authority to regulate a holding company's capital reserves includes the authority to ensure that those capital reserves are used to protect the safety of subsidiary banks. Indeed, it is difficult to conceive of any other purpose for Congress's authorizing the Board to regulate a holding company's capital adequacy.

company ordinarily must provide the necessary additional capital.

3. The court of appeals' rejection of the Board's source of strength policy—on the grounds that a parent bank holding company cannot be required to ignore its own separate corporate status, see J.A. 33-35—collapses under analysis. First, had Congress intended that the Board uniformly observe a rigid distinction between holding companies and subsidiary banks, it would not have vested the Board with the power, under FISA, to rectify *holding company* practices that adversely affect *bank* safety.

Moreover, for purposes of assessing the effect of holding company conduct on the financial soundness of subsidiary banks, the strict separation of corporate entities demanded by the court of appeals' reasoning is belied by the economic realities of holding company operations. A holding company's subsidiary banks are—by definition—under the holding company's ownership or control. As expert observers have pointed out, a bank holding company under the current regulatory framework, in some respects, functions as a single economic entity.[24] The holding company may well be separately incorporated, but that separate corporate status does not prevent it from deriving considerable economic benefits from its subsidiary banks. Indeed, the holding company derives

---

[24] For example, then Chairman of the Federal Reserve Board, Paul Volcker, recently told Congress:

> "[T]he practical realities of the market place and the internal dynamics of a business organization under central direction drive bank holding companies to act . . . as one business entity, with the component parts drawing on each other for marketing and financial strength. Certainly the market conceives of a bank holding company and its components in that way. And if market participants tend to consider the bank holding company as an integrated entity, problems in one part of the system will inevitably be transmitted to other parts."

S. Rep. No. 19, 100th Cong., 1st Sess. 9 (1987); see also Mayne, *New Directions in Bank Holding Company Supervision*, 95 Banking L.J. 729, 730-732 (1978).

distinct commercial advantages from control of institutions that, through their power to accept federally insured deposit, have the ability to attract capital and to make profitable loans and investments. The Board's source of strength policy ensures that the relationship between the holding company and its banks does not become a one-way street permitting the holding company to derive the full benefit of federal deposit insurance and to maximize its own economic advantage without imposing correlative obligations to preserve bank safety or to prevent injury to depositors and the federal insurance system.

In any event, a key factual premise of the court of appeals' "separate corporation" analysis—that a transfer of funds from the holding company to a trouble subsidiary would amount to a wasting of the holding company's assets, see J.A. 34—is made from whole cloth. If such a transfer were to occur, the holding company would continue to control the bank after additional capital has been provided. The primary effect of this new capital is to give the bank additional protection against further losses, to increase public confidence in the institution, and thus to minimize the chance that the bank would be closed. Rather than depleting holding company resources, the anticipated result of the holding company's recapitalizaiton of a troubled subsidiary—and the purpose of the Board's policy—is the preservation of the bank as a going concern (often the most important asset of the parent company).

Moreover, in enacting FIRREA, Congress recently amended FISA's cease-and-desist authority to make clear that the Board is empowered to order holding companies to divest themselves of assets or "take such other action as [the Board] determines to be appropriate." Pub. L. No. 101-73, Tit. IX, § 902, 103 Stat. 450 (1989). In reporting out this legislation, the House Conference Committee explained that it "clarifies [a banking agency's authority] to order restitution or reimbursement" of a

subsidiary and to restrict "specific activities of a financial institution." H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 439 (1989). FIRREA's amendment to FISA, effective upon enactment and thus applicable to MCorp's current operations, thus confirms that the Board has broad authority to order disposition of assets or other actions deemed necessary to bank safety.

B. The BHCA Further Supports The Board's Promulgation And Enforcement Of The Source Of Strength Regulations

The Bank Holding Company Act—particularly its provision empowering the Board to consider the "future prospects" of subsidiary banks when approving acquisitions, 12 U.S.C. 1842(c)—further supports the Board's source of strength regulations. In *First Lincolnwood Corp.*, 439 U.S. at 249-252, this Court held that Section 3(c) of the BHCA, 12 U.S.C. 1842(c), authorizes the Board, when reviewing a proposed bank acquisition, to consider whether a holding company can act as a source of strength to a subsidiary bank. Here, the court of appeals, in light of *First Lincolnwood*, limited the reach of Section 1842(c) to the acquisition stage. See J.A. 29-31. That limitation is at odds with the statutory scheme of the BHCA, which vests the Board with broad powers to regulate holding companies' ongoing banking practices, and purports to render *First Lincolnwood* much ado about nothing.

1. At the outset, unless the Board can impose on holding companies a *continuing* obligation to act as sources of strength to subsidiary banks, the Board's undisputed power under Section 1842(c) to consider holding companies' resources when reviewing bank acquisitions would have virtually no impact on bank safety.[25] Such a state

[25] The court of appeals stated that "[a]s a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial [s]oundness." J.A. 31-32 n.5. The court's equivocal statement offers the Board little solace, since the Board—under the court's holding—would still lack any statutory basis for enforcing the source of strength policy against the thousands of banks that are already under holding company control.

of affairs would be inconsistent with the mandate of Section 1842(c) that requires the Board to consider the "future prospects" of banks that may come under the holding company's control. Indeed, the Board's express statutory power to base the approval of a bank acquisition on the holding company's *ability* to protect the capital position of a proposed subsidiary would be nullified if the holding company has no continuing obligation to *fulfill* that requirement once the bank acquisition is completed.

We recognize that Section 1842(c), by its terms, does not empower the Board to consider the holding company's continuing compliance with the terms and conditions of the acquisition. Nonetheless, the Board, under 12 U.S.C. 1844(b), has express authority to "issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of [the BHCA] and *prevent evasions thereof*" (emphasis added). Accordingly, the Board may reasonably regard a holding company's failure to adhere to the requirements governing its initial acquisition as an evasion of the purposes of the BHCA—an evasion that is remediable as an unsafe and unsound banking practice under FISA, 12 U.S.C. 1818(b)(1).[26]

2. The entire statutory scheme and the BHCA governing the Board's authority over holding companies reflects

[26] As originally enacted, the BHCA's restrictions on the transfer of funds among holding company affiliates did not expressly except regulatory orders mandating recapitalization of deficient banks. Bank Holding Company Act of 1956, ch. 240, § 6, 70 Stat. 137, repealed by Act of July 1, 1966, Pub. L. No. 89-485, § 9, 80 Stat. 240. But that is no indication that Congress intended to deprive the Board of authority under FISA to require such recapitalization in appropriate circumstances. Congress designed the now-repealed BHCA restrictions on inter-company transactions only to prevent a holding company from initiating transactions that unduly disadvantaged the resources of the subsidiary bank. See S. Rep. No. 1095, 84th Cong., 1st Sess. Pt. 1, at 15 (1955).

Congress's intent that the Board exercise ongoing supervisory powers over holding company operations that affect the stability of subsidiary banks. Accordingly, Congress gave the Board power to examine the financial transactions and records of each holding company and subsidiary, see 12 U.S.C. 1844(c)—a power this Court has characterized as "perhaps the most effective weapon of federal regulation of banking." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963). In addition, Congress authorized the Board to curtail holding companies' ability to engage in "nonbank" activities that pose risks to the financial stability of subsidiary banks. See 12 U.S.C. 1843, 1844(e).

These statutory provisions—among others[27]—show that Congress plainly intended to vest the Board with broad and substantial powers to regulate holding company practices that bear directly on the day-to-day integrity of banking subsidiaries. Cf. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163 (1967). The Board's source of strength regulations thus further Congress's overarching objective of "assur[ing] that financial institutions are not endangered with respect to activities engaged in by parent holding companies." S. Rep. No. 902, *supra*, at 10.

C. Congress's Repeal Of Shareholder Assessment Provisions Of The National Bank Act Does Not Undermine The Validity Of The Board's Source Of Strength Regulations

MCorp contends (90-913 Br. in Opp. 5-9) that the so-called "shareholder assessment" provisions of the National Banking Act, which Congress repealed over 30 years ago, show that Congress had no intention of con-

[27] As mentioned above, under ILSA, the Board has authority to establish minimum capital requirements for holding companies where necessary to promote bank safety. See 12 U.S.C. 3907, 3909(a)(2); 12 C.F.R. 263.35-263.40. And under FISA, the Board can order holding companies to cease and desist from engaging in unsafe banking practices. See 12 U.S.C. 1818(b).

ferring similar authority on the Board under the guise of source of strength regulations. That contention is wide of the mark.

First, actions of the Congresses that repealed provisions of the National Bank Act have no bearing on this case, since those Congresses assuredly did not enact the statutory provisions at issue, namely, the pertinent aspects of the BHCA, FISA, and ILSA. See pp. 2-6, *supra*. Second, MCorp's equating the regulatory regimes of "shareholder assessment" and source of strength is a sleight of hand. Under the National Bank Act, shareholder assessments were to be collected only after the bank had failed, in order to reduce losses incurred by the bank's creditors.[28] The Board's source of strength policy, in stark contrast, is remedial. That policy seeks to prevent bank failures—and the resulting losses to depositors and other creditors—by requiring the bank's parent holding company to provide needed capital before the bank fails.

[28] See Act of June 3, 1864, ch. 106, §§ 12, 50, 13 Stat. 102-103, 114-115; see also Act of Dec. 23, 1913, ch. 6, § 25, 38 Stat. 273.

CONCLUSION

The judgment of the court of appeals vacating the district court's injunction with respect to proceedings on the Board's Section 23A charges should be affirmed. The judgment of the court of appeals remanding the case with instructions to enjoin proceedings on the Board's source of strength charges should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
JEFFREY A. CLAIR
Attorneys

JAMES V. MATTINGLY, JR.
General Counsel

RICHARD M. ASHTON
Associate General Counsel

Board of Governors of the
Federal Reserve System

APRIL 1991

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(a) of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(a):

> **Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval**
>
> It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 1841(b) of this title and except as provided in paragraphs (2) and (3) of section 1841(g) of this title, or (ii) in the regular course of secur-

ing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956, in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition. The Board is authorized upon application by a bank to extend, from time to time for not more than one year at a time, the two-year period referred to above for disposing of any shares acquired by a bank in the regular course of securing or collecting a debt previously contracted in good faith, if, in the Board's judgment, such an extension would not be detrimental to the public interest, but no such extension shall in the aggregate exceed three years. For the purpose of the preceeding sentence, bank shares acquired after December 31, 1970, shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company has sole discretionary authority to exercise voting rights with respect thereto but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.

Section 3(c) of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(c):

Factors governing determination of application for approval

The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint [of] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served. Notwithstanding any other provision of law, the Board shall not follow any practice or policy in the consideration of any application for the formation of a one-bank holding company if following such practice or policy would result in the rejection of such application solely because the transaction to form such one-bank holding company involves a bank stock loan which is for a

period of not more than twenty-five years. The previous sentence shall not be construed to prohibit the Board from rejecting any application solely because the other financial arrangements are considered unsatisfactory. The Board shall consider transactions involving bank stock loans for the formation of a one-bank holding company having a maturity of twelve years or more on a case by case basis and no such transaction shall be approved if the Board believes the safety or soundness of the bank may be jeopardized.

Section 5 of the Bank Holding Company Act of 1956, 12 U.S.C. 1844:

Administration

(a) Registration of bank holding company

Within one hundred and eighty days after May 9, 1956, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Board on forms prescribed by the Board which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters, as the Board may deem necessary or appropriate to carry out the purposes of this chapter. The Board may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) Regulations and orders

The Board is authorized to issue such regulations and orders as may be necessary to enable

it to administer and carry out the purposes of this chapter and prevent evasions thereof.

(c) Reports required by Board; examinations; cost of examination

The Board from time to time may require reports under oath to keep it informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; and the Board may make examinations of each bank holding company and each holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Board shall, as far as possible, use the report of examinations made by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority for the purposes of this section.

(d) Reports to the Congress; recommendations

Before the expiration of two years following May 9, 1956, and each year thereafter in the Board's annual report to the Congress, the Board shall report to the Congress the results of the administration of this chapter, stating what, if any, substantial difficulties have been encountered in carrying out the purposes of this chapter, and any recommendations as to changes in the law which in the opinion of the Board would be desirable.

(e) Termination of activities or ownership or control of nonbank subsidiaries constituting serious risk

(1) Notwithstanding any other provision of this chapter, the Board may, whenever it has reasonable cause to believe that the continuation by a bank holding company of any activity or of ownership or control of any of its nonbank subsidiaries, other than a nonbank subsidiary of a bank constitutes a serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank and is inconsistent with sound banking principles or with the purposes of this chapter or with the Financial Institutions Supervisory Act of 1966, order the bank holding company or any such nonbank subsidiaries, after due notice and opportunity for hearing, and after considering the views of the bank's primary supervisor, which shall be the Comptroller of the Currency in the case of a national bank or the Federal Deposit Insurance Corporation and the appropriate State supervisory authority in the case of an insured nonmember bank, to terminate such activities or to terminate (within one hundred and twenty days or such longer period as the Board may direct in unusual circumstances) its ownership or control of any such subsidiary either by sale or by distribution of the shares of the subsidiary to the shareholders of the bank holding company. Such distribution shall be pro rata with respect to all of the shareholders of the distributing bank holding company, and the holding company shall not make any charge to its shareholders arising out of such a distribution.

(2) The Board may in its discretion apply to the United States district court within the jurisdiction of which the principal office of the holding company is located, for the enforcement of any effective and outstanding order issued under this section, and such court shall have jurisdiction and power to order and require compliance therewith, but except as provided in section 1848 of this title, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify suspend, terminate, or set aside any such notice or order.

(f) Powers of Board respecting applications, examinations, or other proceedings

In the course of or in connection with an application, examination, investigation or other proceeding under this chapter, the Board, or any member or designated representative thereof, including any person designated to conduct any hearing under this chapter, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpenas duces tecum; and the Board is empowered to make rules and regulations to effectuate the purpose of this subsection. The attendance of witnesses and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place where such proceeding is being conducted. Any party to proceedings under this chapter may apply to the

United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted or where the witness resides or carries on business, for the enforcement of any subpena or subpena duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesses subpenaed under this subsection shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any service required under this subsection may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the Board may by regulation or otherwise provide. Any court having jurisdiction of any proceeding instituted under this subsection may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, arguments, or other records, if in such person's power so to do, in obedience to the subpena of the Board, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year or both.

The Financial Institutions Supervisory Act, 12 U.S.C. 1818, provides in pertinent part:

Termination of status as insured bank

(a) Notice by bank of intention; citation of bank for unsound practices or violations, hearings; judicial review

Any insured bank (except a national member bank, a foreign bank having an insured branch which is a Federal branch, a foreign bank having an insured branch which is required to be insured under section 3104(a) or (b) of this title or State member bank) may, upon not less than ninety days' written notice to the Corporation terminate its status as an insured bank. Whenever the Board of Directors shall find that an insured bank or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such bank, or is in an unsafe or unsound condition to continue operations as an insured bank, or violated an applicable law, rule, regulation or order, or any condition imposed in writing by the Corporation in connection with the granting of any application or other request by the bank, or any written agreement entered into with the Corporation the Board of Directors shall first give to the Comptroller of the Currency in the case of a national bank or a district bank, to the Federal Home Loan Bank Board in the case of an insured Federal savings bank, to the authority having supervision of the bank in the case of a State bank and to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof and shall give a

copy thereof to the bank. Unless such correction shall be made within one hundred and twenty days, or such shorter period not less than twenty day fixed by the Corporation in any case where the Board of Directors in its discretion has determined that the insurance risk of the Corporation is unduly jeopardized or fixed by the Comptroller of the Currency in the case of a national bank, or the Federal Home Loan Bank Board in the case of an insured Federal savings bank, or the State authority in the case of a State bank, or Board of Governors of the Federal Reserve System in the case of a State member bank as the case may be, the Board of Directors, if it shall determine to proceed further shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the Board of Directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the Board of Directors shall make written findings which shall be conclusive. If the Board of Directors shall find that any unsafe or unsound practice or condition or violation specified in such statement has been established and has not been corrected within the time above prescribed in which to make such corrections, the Board of Directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice intention. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank and termination of such status thereupon

may be ordered. Any insured bank whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section. The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this subsection, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such subsequent withdrawals from any deposits of such depositor shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability

to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to engage in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom

should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank or other person concerned (except in the case of a cease-and-desist order issued upon consent which shall become effective at the time specified therein), and shall remain effective and enforceable as pro-

vided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (f) and (h) through (n) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C. 1841 *et seq.*], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C. 611 *et seq.*] or operating under section 25 of the Federal Reserve Act [12 U.S.C. 601 *et seq.*], in the same manner as they apply to a State member insured bank. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c), (d), (h), (i), (k), (l), (m), and (n) of this section shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under subparagraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C. 1841].

(5) This section shall apply, in the same manner as it applies to any insured bank for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(c) Temporary cease-and-desist orders

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the bank or such director, officer, employees, agent, or other person to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order shall become effective upon service upon the bank or such director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank and, un-

less set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administration proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the bank or such director, officer, employee, agent, or other person, until the effective date of such order.

(2) Within ten days after the bank concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank has been served with a temporary cease-and-desist order, the bank or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the bank or such director, officer, employee, agent, or other person under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(d) Temporary cease-and-desist orders; enforcement

In the case of violation or threatened violation of, or failure to obey, a temporary case-and-desist order issued pursuant to paragraph (1)

of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey it shall be the duty of the court to issue such injunction.

* * * * *

(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the bank is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5. Such hearing shall be private, unless the appropriate Federal banking agency, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceedings an order or orders consistent with the provisions of this section. Judicial review of any

such order shall be exclusively as provided in this subsection (h). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to the proceeding, or any person required by an order issued under this section to cease and desist from any of the violations or practices stated therein, may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the bank or the director or officer or other person concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon the filing of such petition, such court shall have jurisdiction, which

upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) Jurisdiction and enforcement; penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the bank is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2)(i) Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any

order which has become final and was issued pursuant to subsection (b), (c), or (s) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: Provided, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the appropriate Federal banking agency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(ii) In determining the amount of the penalty the appropriate Federal banking agency shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(iii) The insured bank or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of title 5. The agency determination shall be made by final order which may be reviewed only as provided in subparagraph (iv). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(iv) Any insured bank or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the insured bank is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within twenty days from the service of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency. The agency shall promptly certify and file in such Court the record upon which the penalty was imposed, as provided in section 2112 of title 28. The findings of the agency shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5.

(v) If any insured bank or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the agency shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action, the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(vi) Each Federal banking agency shall promulgate regulations establishing procedures necessary to implement this paragraph.

* * * * *

(k) Definitions

As used in this section (1) the terms "cease-and-desist order which has become final" and "order which has become final" mean a cease-and-desist order, or an order, issued by the appropriate Federal banking agency with the consent of the bank or the director or officer or other person concerned, or with respect to which no petition for review of the action of the agency has been filed and perfected in a court of appeals as specified in paragraph (2) of subsection (h) of this section, or with respect to which the action of the court in which said petition is so filed is not subject to further review by the Supreme Court of the United States in proceedings provided for in said paragraph, or an order issued under paragraph (1) or (3) of subsection (g) of this section, and (2) the term "violation" includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

Section 902 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, Tit. IX, 103 Stat. 450-453 (amending 12 U.S.C. 1818(b) and (c)), provides in pertinent part:

Amendments To Cease And Desist Authority With Respect To Restitution, Restrictions On Specific Activities, Grounds For Issuance Of a Temporary Order, And Incomplete Or Inaccurate Records

(a) *Depository Institutions Insured By The FDIC.*—

(1) *Cease And Desist Authority.*—Section 8 (b) of the *Federal Deposit Insurance Act* (12 U.S.C. 1818(b)) is amended—

(A) in paragraph (3), by striking out "subsections (c) through (s) and subsection (u)";

(B) in paragraph (4), by striking out "subsections (c) through (f) and (h) through (n)" and inserting in lieu thereof "subsections (c) through (s) and subsection (u)"; and

(C) by adding at the end thereof the following new paragraphs:

"(6) *Affirmative Action To Correct Conditions Resulting From Violations or Practices.*—The Authority to issue an order under this subsection and subsection (c) which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to—

"(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—

"(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

"(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

"(B) restrict the growth of the institution;

"(C) dispose of any loan or asset involved;

"(D) rescind agreements or contracts; and

"(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

"(F) take such other action as the banking agency determines to be appropriate.

"(7) *Authority To Limit Activities.*—The authority to issue an order under this subsection or subsection (c) includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

"(8) *Expansion of Authority To Savings And Loan Affiliates And Entities.*—Subsections (a) through (s) and subsection (u) shall apply to any savings and loan holding company and to any subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, to any service corporation of a savings association and to any subsidiary of such service corporation, whether wholly or partly owned, in the same manner as such subsections apply to a savings association."

(2) *Temporary Cease And Desist Authority.*—Section 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(c)) is amended—

(A) in paragraph (1)—

(i) by striking out "substantial" and inserting in lieu thereof "significant";

(ii) by striking out "seriously" each place such term appears; and

(iii) by inserting after the 1st sentence the following new sentence: "Such order may include any requirement authorized under subsection (b)(6)(B)."; and

(B) by adding at the end thereof the following new paragraph:

"(3) *Incomplete Or Inaccurate Records.*—

"(A) *Temporary Order.*—If a notice of charges served under subsection (b)(1) specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring—

"(i) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

"(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1).

"(B) *Effective period.*—Any temporary order issued under subparagraph (A)—

"(i) shall become effective upon service and

"(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of—

"(I) the completion of the proceeding initiated under subsection (b)(1) in connection with the notice of charges; or

"(II) the date the appropriate Federal banking agency determines, by examination or otherwise, that the insured depository institution's books and records are accurate and reflect the financial condition of the depository institution.".

Section 908 of the International Lending Supervision Act of 1983, 12 U.S.C. 3907:

Capital adequacy

(a)(1) Each appropriate Federal banking agency shall cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency deems appropriate.

(2) Each appropriate Federal banking agency shall have the authority to establish such minimum level of capital for a banking institution

as the appropriate Federal banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.

(b)(1) Failure of a banking institution to maintain capital at or above its minimum level as established pursuant to subsection (a) of this section may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an unsafe and unsound practice within the meaning of section 1818 of this title.

(2)(A) In addition to, or in lieu of, any other action authorized by law, including paragraph (1), the appropriate Federal banking agency may issue a directive to a banking institution that fails to maintain capital at or above its required level as established pursuant to subsection (a) of this section.

(B)(i) Such directive may require the banking institution to submit and adhere to a plan acceptable to the appropriate Federal banking agency describing the means and timing by which the banking institution shall achieve its required capital level.

(ii) Any such directive issued pursuant to this paragraph, including plans submitted pursuant thereto, shall be enforceable under the provisions of section 1818(i) of this title to the same extent as an effective and outstanding order issued pursuant to section 1818(b) of this title which has become final.

(3)(A) Each appropriate Federal banking agency may consider such banking institution's progress in adhering to any plan required under this subsection whenever such banking institu-

tion, or an affiliate thereof, of the holding company which controls such banking institution, seeks the requisite approval of such appropriate Federal banking agency for any proposal which would divert earnings, diminish capital or otherwise impede such banking institution's progress in achieving its minimum capital level.

(B) Such appropriate Federal banking agency may deny such approval where it determines that such proposal would adversely affect the ability of the banking institution to comply with such plan.

(C) The Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury shall encourage governments, central banks, and regulatory authorities of other major banking countries to work toward maintaining and, where appropriate, strengthening the capital bases of banking institutions involved in international lending.

Section 910 of the International Lending Supervision Act of 1983, 12 U.S.C. 3909, provides in pertinent part:

General Authorities

(a) Rules and regulations

(1) The appropriate Federal banking agencies are authorized to interpret and define the terms used in this chapter, and each appropriate Federal banking agency shall prescribe rules or regulations or issue orders as necessary to effectuate the purposes of this chapter and prevent evasions thereof.

(2) The appropriate Federal banking agency is authorized to apply the provisions of this chapter to any affiliate of an insured bank, but only to affiliates for which it is the appropriate Federal banking agency, in order to promote uniform application of this chapter or to prevent evasions thereof.

(3) For purposes of this section, the term "affiliate" shall have the same meaning as in section 371c of this title, except that the term "member bank" in such section shall be deemed to refer to an "insured bank," as such term is used in section 1813(h) of this title.

* * * * *

(c) Existing authorities

(1) The powers and authorities granted in this chapter shall be supplemental to and shall not be deemed in any manner to derogate from or restrict the authority of each appropriate Federal banking agency under section 1818 of this title or any other law including the authority to require additional capital or reserves.

(2) Any such authority may be used by any appropriate Federal banking agency to ensure compliance by a banking institution with the provisions of this chapter and all rules, regulations, or orders issued pursuant thereto.

* * * * *

Section 23A of the Federal Reserve Act, 12 U.S.C. 371c:

Banking affiliates

(a) Restrictions on transactions with affiliates

(1) A member bank and its subsidiaries may engage in a covered transaction with an affiliate only if—

(A) in the case of any affiliate, the aggregate amount of covered transactions of the member bank and its subsidaries will not exceed 10 per centum of the capital stock and surplus of the member bank; and

(B) in the case of all affiliates, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 20 per centum of the capital stock and surplus of the member bank.

(2) For the purpose of this section, any transaction by a member bank with any person shall be deemed to be a transaction with an affiliate to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, that affiliate.

(3) A member bank and its subsidiaries may not purchase a low-quality asset from an affiliate unless the bank or such subsidiary, pursuant to an independent credit evaluation, committed itself to purchase such asset prior to the time such asset was acquired by the affiliate.

(4) Any covered transactions and any transactions exempt under subsection (d) of this section between a member bank and an affiliate shall be on terms and conditions that are consistent with safe and sound banking practices.

(b) Definitions

For the purpose of this section—

(1) the term "affiliate" with respect to a member bank means—

(A) any company that controls the member bank and other company that is con-

trolled by the company that controls the member bank;

(B) a bank subsidiary of the member bank;

(C) any company—

(i) that is controlled directly or indirectly, by a trust or otherwise, by or for the benefit of shareholders who beneficially or otherwise control, directly or indirectly, by trust or otherwise, the member bank or any company that controls the member bank; or

(ii) in which a majority of its directors or trustees constitute a majority of the persons holding any such office with the member bank or any company that controls the member bank;

(D)(i) any company, including a real estate investment trust, that is sponsored and advised on a contractual basis by the member bank or any subsidiary or affiliate of the member bank; or

(ii) any investment company with respect to which a member bank or any affiliate thereof is an investment advisor as defined in section 80a-2(a)(20) of title 15; and

(E) any company that the Board determines by regulation or order to have a relationship with the member bank or any subsidiary or affiliate of the member bank, such that covered transactions by the member bank or its subsidiary with that company may be affected by the relationship to

the detriment of the member bank or its subsidiary; and

(2) the following shall not be considered to be an affiliate:

(A) any company, other than a bank, that is a subsidiary of a member bank, unless a determination is made under paragraph (1)(E) not to exclude such subsidiary company from the definition of affiliate;

(B) any company engaged solely in holding the premises of the member bank;

(C) any company engaged solely in conducting a safe deposit business;

(D) any company engaged solely in holding obligations of the United States or its agencies or obligations fully guaranteed by the United States or its agencies as to principal and interest; and

(E) any company where control results from the exercise of rights arising out of a bona fide debt previously contracted, but only for the period of time specifically authorized under applicable State or Federal law or regulation or, in the absence of such law or regulation, for a period of two years from the date of the exercise of such rights or the effective date of this Act, whichever date is later, subject, upon application, to authorization by the Board for good cause shown of extensions of time for not more than one year at a time, but such extensions in the aggregate shall not exceed three years;

(3)(A) a company or shareholder shall be deemed to have control over another company if—

(i) such company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the other company;

(ii) such company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company; or

(iii) the Board determines, after notice and opportunity for hearing, that such company or shareholder, directly or indirectly over the management or policies of the other company; and

(B) notwithstanding any other provision of this section, no company shall be deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity, except as provided in paragraph (1)(C) of this subsection or if the company owning or controlling such shares is a business trust;

(4) the term "subsidiary" with respect to a specified company means a company that is controlled by such specified company;

(5) the term "bank" includes a State bank, national bank, banking association, and trust company;

(6) the term "company" means a corporation, partnership, business trust, association, or similar organization and, unless specifically excluded, the term "company" includes a "member bank" and a "bank";

(7) the term "covered transaction" means with respect to an affiliate of a member bank—

(A) a loan or extension of credit to the affiliate;

(B) a purchase of or an investment in securities issued by the affiliate;

(C) a purchase of assets, including assets subject to an agreement to repurchase, from the affiliate, except such purchase of real and personal property as may be specifically exempted by the Board by order or regulation;

(D) the acceptance of securities issued by the affiliate as collateral security for a loan or extension of credit to any person or company; or

(E) the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate;

(8) the term "aggregate amount of covered transactions" means the amount of the covered transactions about to be engaged in added to the current amount of all outstanding covered transactions:

(9) the term "securities" means stocks, bonds, debentures, notes, or other similar obligations; and

(10) the term "low-quality asset" means an asset that falls in any one or more of the following categories:

(A) an asset classified as "substandard", "doubtful", or "loss" or treated as "other loans especially mentioned" in the most recent report of examination or inspection of an affiliate prepared by either a Federal or State supervisory agency;

(B) as asset in a nonaccrual status;

(C) an asset on which principal or interest payments are more than thirty days past due; or

(D) an asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(c) Collateral for certain transactions with affiliates

(1) Each loan or extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of, an affiliate by a member bank or its subsidiary shall be secured at the time of the transaction by collateral having a market value equal to—

(A) 100 per centum of the amount of such loan or extension of credit, guarantee, acceptance, or letter of credit, if the collateral is composed of—

(i) obligations of the United States or its agencies;

(ii) obligations fully guaranteed by the United States or its agencies as to principal and interest;

(iii) notes, drafts, bills of exchange or bankers' acceptances that are eligible for rediscount or purchase by a Federal Reserve Bank; or

(iv) a segregated, earmarked deposit account with the member bank;

(B) 110 per centum of the amount of such loan or extension of credit, guarantee, aceptance, or letter of credit if the collateral is composed of obligations of any State or political subdivision of any State;

(C) 120 per centum of the amount of such loan or extension of credit, guarantee, acceptance, or letter of credit if the collateral is composed of other debt instruments, including receivables; or

(D) 130 per centum of the amount of such loan or extension of credit, guarantee, acceptance, or letter of credit if the collateral is composed of stock, leases, or other real or personal property.

(d) Exemptions

The provisions of this section, except subsection (a)(4) of this section, shall not be applicable to—

(1) any transaction, subject to the prohibition contained in subsection (a)(3) of this section, with a bank—

(A) which controls 80 per centum or more of the voting shares of the member bank;

(B) in which the member bank controls 80 per centum or more of the voting shares; or

(C) in which 80 per centum or more of the voting shares are controlled by the company that controls 80 per centum or more of the voting shares of the member bank;

(2) making deposits in an affiliated bank or affiliated foreign bank in the ordinary course of

correspondent business, subject to any restrictions that the Board may prescribe by regulation or order;

(3) giving immediate credit to an affiliate for uncollected items received in the ordinary course of business;

(4) making a loan or extension of credit to, or issuing a guarantee, acceptance, or letter of credit on behalf of, an affiliate that is fully secured by—

(A) obligations of the United States or its agencies;

(B) obligations fully guaranteed by the United States or its agencies as to principal and interest; or

(C) a segregated, earmarked deposit account with the member bank;

(5) purchasing securities issued by an company of the kinds described in section 1843(c)(1) of this title;

(6) purchasing assets having a readily identifiable and publicly available market quotation and purchased at that market quotation or, subject to the prohibition contained in subsection (a)(3) of this section, purchasing loans on a nonrecourse basis from affiliated banks; and

(7) purchasing from an affiliate a loan or extension of credit that was originated by the member bank and sold to the affiliate subject to a repurchase agreement or with recourse.

(e) Rulemaking and additional exemptions

(1) The Board may issue such further regulations and orders, including definitions consistent with this section, as may be necessary to

administer and carry out the purposes of this section and to prevent evasions thereof.

(2) The Board may, at its discretion, by regulation or order exempt transactions or relationships from the requirements of this section if it finds such exemptions to be in the public interest and consistent with the purposes of this section.

Title 12, Code of Federal Regulations, Part 225, provides in pertinent part:

Subpart A—General Provisions

§ 225.1 Authority, purpose, and scope.

(a) *Authority.* This part (Regulation Y) is issued by the Board of Governors of the Federal Reserve System ("Board") under section 5(b) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(b)) ("BHC Act"); sections 8 and 13(a) of the International Banking Act of 1978 (12 U.S.C. 3106 and 3108); section 7(j)(13) of the Federal Deposit Insurance Act, as amended by the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(13) ("Bank Control Act"); section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (b)); and the International Lending Supervision Act of 1983 (Pub. L. 98-181, Title IX). The BHC codified at 12 U.S.C. 1841, *et seq.*

(b) *Purpose.* The principal purposes of this part are to regulate the acquisition of control of banks by companies and individuals, to define and regulate the nonbanking activities in which bank holding companies and foreign banking organizations with United States operations may engage, and to set forth the procedures for se-

curing approval for such transactions and activities.

(c) *Scope.* (1) Subpart A contains general provisions and definitions of terms used in this regulation.

* * * * *

§ 225.4 Corporate practices.

(a) *Banking holding company policy and operations.* (1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner.

(2) Whenever the Board believes an activity of a bank holding company or control of a nonbank subsidiary (other than a nonbank subsidiary of a bank) constitutes a serious risk to the financial safety, soundness, or stability of a subsidiary bank of the bank holding company and is inconsistent with sound banking principles or the purposes of the BHC Act or the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*), the Board may require the bank holding company to terminate the activity or to terminate control of the subsidiary, as provided in section 5(e) of the BHC Act.

* * * * *

§ 225.5 Registration, reports and inspections.

(a) *Registration of bank holding companies.* Each company shall register within 180 days after becoming a bank holding company by furnishing information in the manner and form prescribed by the Board. A company that re-

ceives the Board's prior approval under Subpart B of this regulation to become a bank holding company may complete this registration requirement through submission of its first annual report to the Board as required by paragraph (b) of this section.

(b) *Reports of bank holding companies.* Each bank holding company shall furnish, in the manner and form prescribed by the Board, an annual report of the company's operations for the fiscal year in which it becomes a bank holding company, and for each fiscal year during which it remains a bank holding company. Additional information and reports shall be furnished as the Board may require.

(c) *Examinations and inspections.* The Board may examine or inspect any bank holding company and each of its subsidiaries and prepare a report of their operations and activities. With respect to a foreign banking organization, the Board may also examine any branch or agency of a foreign bank in any state of the United States and may examine or inspect each of the organization's subsidiaries in the United States and prepare reports of their operations and activities. The Board will rely as far as possible on the reports of examination made by the primary federal or state supervisor of the subsidiary bank of a bank holding company or of the branch or agency of the foreign bank.

§ 225.6 Penalties for violations.

(a) *Criminal and civil penalties.* Section 8 of the BHC Act provides criminal penalties for willful violation, and civil penalties for violation, by

any company or individual of the BHC Act or any regulation or order issued under it, or for making a false entry in any book, report, or statement of a bank holding company. Civil money penalty assessments for violations of the BHC Act shall be made in accordance with Subpart B of the Board's Rules of Practice for Hearings (12 CFR Part 263, subpart B). For any willful violation of the Bank Control Act or any regulation or order issued under it, the Board may assess a civil penalty as provided in 12 U.S.C. 1817(j)(15).

(b) *Cease and desist proceedings.* For any violation of the BHC Act, the Bank Control Act, this regulation, or any order or notice issued there under, the Board may institute a cease and desist proceeding in accordance with the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*)

Title 11, United States Code, Section 105:

Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

Title 11, United States Code, Section 362:

Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the

estate or to exercise control over property of the estate.

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulate power;

(6) under subsection (a) of this section of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or

other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance of the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease or nonresidential real property that has terminated by the expiration of the

stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [sic]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 *et seq.*) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 of title 1I of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 *et seq.*, respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920

(46 App. U.S.C. 911 *et seq.*) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 *et seq.* respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a rehearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such a stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of an act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Title 28, United States Code, Section 1334:

Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1991 282061 20478